

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5420 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
  2. To be referred to the Reporter or not? : YES
  3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
  5. Whether it is to be circulated to the Civil Judge? : NO

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M I KHAN

Versus

DIRECTOR GENERAL  
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Appearance:

MR IS SUPEHIA for Petitioner

MR AKSHAY H MEHTA for Respondent No. 1, 2  
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CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 16/06/2000

ORAL JUDGEMENT

The present petition has been filed under Article 226 of the Constitution of India read with Articles 14 and 16 thereof, challenging the action of the respondents in not promoting the petitioner from the post of Inspector to the post of Assistant Commandant in Border Security Force.

2. The petitioner claims that he was working as Police Inspector in Border Security Force since 20.11.1980 and therefore, he was eligible for promotion to the post of Assistant Commandant. That by a wireless message, 66 Inspectors were promoted to the post of Assistant Commandant w.e.f. 10.2.1989. That out of these, 35 Inspectors are junior to the petitioner, that at the time when the junior Inspectors were promoted to the post of Assistant Commandant, the petitioner was not promoted to the said post. That against the said supersession, the petitioner has made representation to the first respondent on 22.2.1989 as per Annexure 'C'. That his representation was rejected by the respondent by letter dated 29.5.1989, copy of which has been placed at Annexure 'B'.

3. The petitioner claims that promotion from the post of Inspector to the post of Assistant Commandant has to be made on the basis of merit having due regard to seniority as per rules of the department. That it would mean that seniority has to play a predominant part and the criterion for promotion would be seniority-cum-merit and in that case the petitioner could be superseded only if he was found positively unfit for promotion. That there was no material before the departmental committee for finding the petitioner positively unfit for the said promotion and the supersession is liable to be set aside. That the Committee had applied the criterion of merits only, which criterion was meant for the higher posts of Deputy Inspector General and above as per the rules applicable to the petitioner. That therefore, incorrect criterion has been applied in the present case. Hence supersession is liable to be set aside, that the petitioner would even satisfy the criterion of pure merits apart from merits having due regard to seniority. It is stated that no adverse remarks were even communicated to the petitioner which would mean that all his confidential records were good and above. The petitioner was never imposed any penalty and not even warning or censure was imposed. That on the other hand, the petitioner had received merit certificates in 82-83 onwards and even cash awards were also awarded to the petitioner as stated in para 8 of the petition. The petitioner further contends that the Annual Confidential Report for the year 1982, 1983 and 1984 were not available with the Departmental Promotion Committee. That the self-appraisal reports were required to be submitted by the petitioner in 1987 but he could not do so. Therefore, the department did not have any Annual Confidential Report for the aforesaid three years at the

time when the case of promotion of the petitioner was considered. Therefore, it is apparent that the Departmental Committee did not consider the services of the petitioner for the aforesaid three years i.e. 1982, 1983 and 1984. Therefore, also the omission of name of the petitioner from the select list for the promotion was illegal. The petitioner also contended that the persons junior to the petitioner who have been promoted from 10.2.1989 did not possess outstanding service records so as to supersede the petitioner and in fact some of them had suffered penalties to their discredit. That the respondents may be called upon to produce the service records of the petitioner as also those of juniors promoted from 10.2.1989 before this Court. The petitioner has further contended that the petitioner's service record is good since no adverse remarks have been communicated to him. That if the service record is good then the petitioner would satisfy the test of even pure merit and hence he cannot be superseded. The petitioner has, therefore, challenged his supersession and for appropriate writ, order or direction quashing and setting aside the supersession of the petitioner for the post of Assistant Commandant and for direction to the respondents or any committee appointed by them to consider the case of the petitioner for promotion to the post of Assistant Commandant in proper perspective and/or promote him to the said post w.e.f. 10.2.1989 with all consequential benefits.

4. When this Special Civil Application came up for admission Notice pending admission was issued. Interim relief was also granted directing that the promotions already made so far shall be subject to the result of the petition.

5. On receipt of notice, the respondents have submitted affidavit in reply of Mr Surinder Singh, D.I.G., B.S.F. At page 25 in para 9 of the said affidavit the respondents have contended that the promotion from the post of Inspector to the post of Assistant Commandant is given on the basis of merits with due regard to seniority which does not mean that the person who is senior though unfit should be promoted i.e. the principle where the criterion is seniority-cum-merits for the promotion and not merit-cum-seniority, merit-cum-seniority - means if the junior is found more fit than the senior, then the junior can be promoted bypassing the senior and in the present case the criterion applicable is merits with due regard to seniority and the same has been followed by the respondents. It has been further contended in the

affidavit that the Ministry of Home Affairs has issued notification dated 28.1.1985 clarifying the rule for promotion which has been produced on record. However, it has been contended in the affidavit that the eligible persons are classified into three categories, namely; outstanding, very good and good. That the case of the petitioner was considered by the Departmental Promotion Committee which met on 16.6.1988 and it was also reviewed by the said Committee on 26.12.1988. That the petitioner was placed in 'good' category by the said Committee after considering the confidential report and overall performance. That the Departmental Promotion Committee has placed two Inspectors in 'outstanding' category and 18 Inspectors in 'very good' category followed by 8 Inspectors in 'good' category being SC/ST and the petitioner was included in 'good' category' and, therefore, he was not within first 66 Inspectors who are eligible for promotion and, therefore, he has been left out with other 112 Inspectors who have not been promoted at the relevant time. In view of the aforesaid, it is submitted that the petitioner was not entitled to be promoted at the relevant point of time and, there is no merit in the present petition and hence it may be dismissed with costs.

6. Thereafter, the petitioner has filed affidavit-in-rejoinder at page 34. There again he has re-agitated that the Annual Confidential Reports in respect of the petitioner for the years 1982, 1983 and 1984 stating that they were not available with the Departmental Promotion Committee and that the petitioner has been treated to be 'good' and, therefore, considering his record, he should have been included in the category of 'outstanding' or at any rate 'very good'.

7. It may be clarified that the respondents have made it clear in their affidavit that the Annual Confidential Reports for the year 1982, 1983 and 1984 were available with the Departmental Promotion Committee when the case of the promotion in respect of the petitioner was considered by the said Committee.

8. On the aforesaid set of pleadings and affidavits, I have heard the learned Advocates for the parties and have perused the papers. It has been contended on behalf of the petitioner that the criteria for promotion from the post of Inspector to the post of Assistant Commandant is seniority-cum-merit and not merit-cum-seniority. For the said purpose, learned Advocate for the petitioner has referred to the promotional rules placed at Annexure 'A'. These are the rules namely; Border Security Force

(Seniority, Promotion and Superannuation of Officers) Rules, 1978. The relevant rule is Rule 5. Sub-rule (1) of Rule 5 reads as under:

"5. Promotion of Officers: (1) Promotion of officers upto the rank of Commandant shall be made on the basis of merit having due regard to seniority."

9. On the strength of the aforesaid rule 5(1) of the said Rules, it has been strenuously contended by the learned Advocate for the petitioner that the criterion for promotion is seniority-cum-merits and not merit-cum-seniority. It is not possible for me to agree with the said argument advanced on behalf of the petitioner. The rule itself specifically says that the promotion shall be made on the basis of merits having due regard to seniority. This would mean that the department would first consider criterion of merit and while promoting the person concerned, due regard will also be given to the seniority. This would mean that while considering the cases of promotion, due weightage seems to be given to the seniority but it would not mean that seniority will be the sole criterion for considering the case of promotion. The rule itself shows clearly that the promotion is being released only on the basis of merit with due regard to the seniority which would mean that the case of merit-cum-seniority and not seniority-cum-merit.

17.1. Learned Advocate for the petitioner also argued that the department has wrongly applied the criteria of Rule 5(2) of the said rules as said above. The said rule has not been applied while considering the case of the petitioner in February, 1989. Rule 5(2) will come into play when the merit is solely considered. Here the petitioner's case is considered on merit-cum-seniority. That would be governed by rule 5(1). Therefore, there is no illegality committed by the department in bypassing the petitioner in February, 1989.

17.2. Learned Advocate for the petitioner has relied upon a decision in the case of B G Joshi v. Gujarat Public Service Commission recorded in Special Civil Application No.150 of 1985. This Court has recorded findings in the aforesaid decision dated 2.7.1985 that when the petitioner was considered to be 'good', then he could not be dropped from the promotional list. In the said case, the respondents were directed to promote the petitioner to the post of Dy.Commissioner of Industries w.e.f. 2.11.1989, the date on which his junior was

promoted to that post. Here the factual aspects are different. Though the petitioner was classified as 'good', there were other persons who have been classified as 'very good' and 'outstanding' and the promotions were required to be released on merit-cum-seniority. Therefore, while considering the merits, the department promoted persons who have been classified as 'outstanding' and 'very good' before releasing the promotion in respect of the persons who have been classified as 'good'. Therefore, there are three categories. The persons with better merits, have been promoted first which was not the case in the aforesaid decision relied upon by the petitioner. Therefore, the principle enunciated in that matter will not apply on facts to the case before this Court.

10. Therefore, it is not possible for me to agree with the arguments advanced by the learned Advocate for the petitioner that the criterion for promotion is seniority-cum-merit. I am of the opinion that the rules make it clear that the criterion for promotion in this case is merit-cum-seniority.

11. So far as the Annual Confidential Reports for the year 1982, 1983 and 1984 are concerned, it has been contended on behalf of the petitioner that those reports were not available with the department when the case of promotion of the petitioner was considered. On the other hand, there is positive affidavit filed on behalf of the respondent that those Confidential Reports were with the department when the case of the promotion of the petitioner was considered. At this stage, it has been argued by the learned Advocate for the petitioner that in the year 1987, the petitioner was asked to submit his self-appraisal report and he could not do it for want of sufficient time and on account of lapse of about three years that he did not have sufficient material with him at that point of time to fill up the self-appraisal report and, therefore, he could not submit it. Therefore, the department did not have the Annual Confidential Report for the years 1982, 1983 and 1984 with them at the time when the case of promotion of the petitioner was considered. Simply because self-appraisal reports were not furnished by the petitioner to the department, the department would not be debarred from preparing the Annual Confidential Report. The only thing is that the ACR prepared by the department would be without any self-appraisal report of the petitioner. When there is positive evidence, it cannot be said that the said reports were not available with the department when the case of the petitioner for promotion as

aforesaid was considered. Therefore, it is not possible for me to agree with the arguments of the learned Advocate for the petitioner that the ACR for the years 1982, 1983 and 1984 in respect of the petitioner were not available with the department and they were not considered by the department at the time when the case of promotion of the petitioner was considered. In other words, it cannot be said that the department bypassed the petitioner without considering the ACR of the petitioner for the years 1982, 1983 and 1984.

12. As said above, it also cannot be said that the department applied wrong criteria of meritorious service and did not apply the correct criterion of seniority-cum-merits. As stated above, rules make it clear that the promotion is to be released on merit-cum-seniority. Therefore, wrong criteria could not be said to have been applied by the department while considering the case of promotion in respect of the petitioner. It has further been contended that no adverse remarks has been communicated to the petitioner and, therefore, it has to be inferred that there is no adverse remarks in ACR in respect of the petitioner. Even if there was no adverse remarks and it was not communicated to the petitioner, the matter would not end there. Since the promotion is to be released on the basis of merit-cum-seniority. Therefore, even if there is no positive demerit, the department will consider merits of the eligible persons and in doing so, if it is found that there are persons junior to the petitioner in rank, but having more merits, then the department may place them above the petitioner. Even if the petitioner may not have suffered any adverse remarks, then also this argument will not come to the rescue of the petitioner. It has been contended in para 10 of the petition that there are persons junior to the petitioner who have been promoted did not possess outstanding service records so as to supersede the petitioner and in fact some of them had penalties to their discredit. There is no further material about the same. Moreover, their names have not been mentioned in the petition. Therefore, it may not be possible for the respondent to properly reply to the said contention of the petitioner. It is not mentioned as to how the petitioner came to know about this position that some juniors to the petitioner did not have good remarks. Therefore, this sort of allegations cannot be taken into consideration by this Court. It has also been contended in para 11 that the petitioners service record is good since no adverse remarks has been communicated. So far as the respondents are concerned they made it clear that the petitioner has been classified as 'good'. Therefore,

there is no dispute with respect to the same. However, the respondents have also made it clear that there are some persons classified as 'very good' and some other persons have been classified as 'outstanding'. When the promotions are released on merit-cum-seniority, persons who have been classified as 'outstanding' have to be preferred over to the persons who have been classified as 'very good' and persons who have been classified as 'very good' have to be preferred over the persons who have been categorised as 'good'. When the petitioner has been categorised as 'good', he has to stand below to those who have been classified as 'outstanding' and 'very good'. Therefore, even if the petitioner is right in saying that his record is good, he will not be benefitted by saying so when there are certain persons who may be otherwise junior to him, but who have been categorised as 'outstanding' and 'very good' and the petitioner has to stand below to those 'outstanding' and 'very good' persons. It has been lastly contended that the petitioner subsequently promoted in the same year in the month of October. So he was promoted as Assistant Commandant in October, 1989. It has therefore, been contended that he was promoted in the same year without any additional material. But the promotion was granted on the same set of material which would show that there was nothing against the petitioner, and he was promoted only on receipt of notice of the Court. The fact appears to be that the petitioner was categorised as 'good'. The persons who have been categorised as outstanding must have been promoted earlier followed by the persons categorised as 'very good'. After the issue of promotion orders in respect of those 'outstanding' and 'very good' persons, the department must have taken cases of persons who have been categorised as 'good' and it appears to have been released orders in respect of such promotion and, therefore, even the petitioner was promoted in October, 1989 on the same set of materials which would not be on account of the receipt of the notice of the Court, but because of the fact that the petitioner's turn was there to be promoted on par with others who may have been categorised as 'good'.

13. On the aforesaid facts and circumstances of the case, it is very clear that the department cannot be said to have applied a wrong criteria of merit-cum-seniority. In fact the department cannot be said to have applied the criteria of merits only. The department has clearly said that the criteria of merit-cum-seniority has been applied and considered rules Annexure 'A' and particularly sub-rule (1). Sub-rule (1) of Rule 5 makes it clear that the promotion has to be released on the strength of

merits with due regard to seniority which would mean merit-cum-seniority. The department has, therefore, applied the correct criteria for releasing promotion. No illegality has, therefore, been shown to have been committed by the department in bypassing the petitioner while promoting his juniors who were otherwise persons classified as 'outstanding' and 'very good'. Therefore, there is no substance in the present petition and the department cannot be said to have committed anything illegal or wrong.

In the aforesaid facts and circumstances of the case and considering the rules for promotion, there is no merit in the present petition and it deserves to be dismissed. This Special Civil Application is accordingly ordered to be dismissed with costs of the respondent. Rule discharged. Interim relief stands vacated.

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msp.